



THE STATE BAR OF CALIFORNIA

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DATE: April 12, 2007

TO: Members of the Regulation, Admissions and Discipline Oversight Committee

FROM: James E. Towery, Chair, Insurance Disclosure Task Force
Saul Bercovitch, Staff Attorney
Jill Sperber, Director, Office of Mandatory Fee Arbitration

SUBJECT: Insurance Disclosure Task Force – Report and Recommendations upon Return from Public Comment

- 1) Request for authorization to release revised, proposed new insurance disclosure rules for public comment
- 2) Request to maintain the Insurance Disclosure Task Force as a resource to assist with developing public educational material concerning professional liability insurance

EXECUTIVE SUMMARY

In May 2005, State Bar President John Van de Kamp, in consultation with the California Supreme Court, appointed the State Bar of California Insurance Disclosure Task Force to study 1) if there should be a requirement in California that attorneys disclose whether they maintain professional liability insurance; 2) if so, what the exact nature and scope of that requirement should be; and 3) what the best vehicle would be for creating and enforcing any such requirement.

In June 2006, upon recommendation of the Task Force, the Regulation, Admissions and Discipline Oversight Committee (RAD) approved a request to release proposed new insurance disclosure rules for public comment, along with an accompanying recommendation to maintain the Task Force as a resource to assist with developing public educational material concerning professional liability insurance.

The Task Force has met and considered the public comments. The Task Force recommends keeping the basic structure of its June 2006 proposal, with modifications to some particular aspects of that proposal. The Task Force now recommends that RAD approve a request to release revised, proposed insurance disclosure rules for public comment for a shortened period of time of 30 days, and approve the accompanying Task Force recommendations as part of an expanded insurance-related package.

For further information on this item, contact Saul Bercovitch at (415) 538-2306 or by email at Saul.Bercovitch@calbar.ca.gov, or Jill Sperber at (415) 538-2023 or by email at Jill.Sperber@calbar.ca.gov.

I. Background

A. Task Force creation and charge

In May 2005, State Bar President John Van de Kamp, in consultation with the California Supreme Court, appointed the State Bar of California Insurance Disclosure Task Force. The Task Force was created to study the following issues:

1. Should there be a requirement in California that attorneys disclose whether they maintain professional liability insurance?
2. If so, what should the exact nature and scope of that requirement be?
3. What is the best vehicle for creating and enforcing any such requirement?

Task Force recommendations for any new rules were to be presented to the Board of Governors and, if approved, to the Supreme Court.

B. Initial Task Force recommendations – June 2006

To address its charge, the Task Force examined the *ABA Model Court Rule on Insurance Disclosure*, the status of insurance disclosure rules in other states, the history of an insurance disclosure obligation in California, and other general background material relating to professional liability insurance, attorney malpractice claims, and remedies available to address harm to clients. In June 2006, the Task Force presented its Report and Recommendations to the Regulation, Admissions and Discipline Oversight Committee (RAD).¹ In summary, the Task Force recommendations were:

1. California should adopt an insurance disclosure requirement.
2. The required disclosure concerning insurance should be made a) directly to the client; and b) to the State Bar, which will make the information publicly available on the State Bar's website or by a similar method.
3. Attorneys should be required to make the insurance disclosure to clients – directly, and indirectly through the State Bar – only when they are *not* covered by professional liability insurance.
4. Two companion rules should be adopted. A new Rule of Professional Conduct should require direct disclosure of the absence of insurance to a client. A new Rule of Court should require attorneys to certify to the State Bar whether they are covered by insurance, and provide that the State Bar will

¹ The June 2, 2006 *Insurance Disclosure Task Force – Report and Recommendations* is included as Attachment 1 to this Agenda Item. That report sets forth in detail the development of the June 2006 Task Force recommendations and the rationale behind those recommendations.

make publicly available the identity of individual attorneys who inform the State Bar that they are not insured.

5. Failure to comply with the new Rule of Court in a timely fashion should result in non-disciplinary, administrative suspension. Supplying false information in response to the new Rule of Court should subject an attorney to appropriate disciplinary action. Violation of the new Rule of Professional Conduct would implicate all the remedies that otherwise apply to a violation of the Rules of Professional Conduct, so there is no need to create a specific remedy.
6. Attorneys who are employed as government lawyers or in-house counsel and do not represent clients outside that capacity should be exempt from the insurance disclosure requirements.
7. State Bar staff should develop educational material for the public concerning professional liability insurance, in consultation with members of the Task Force, to complement the proposed insurance disclosure requirements.

On June 16, 2006, RAD approved the request to release two proposed new insurance disclosure rules for public comment, along with an accompanying recommendation to maintain the Task Force as a resource to assist with developing public educational material concerning professional liability insurance.

C. Public comments received in response to the June 2006 proposed insurance disclosure rules

The State Bar received 112 comments in response to the proposed insurance disclosure rules.² Most of the comments came from individual attorneys, but some came from committees, groups, or other organizations. The vast majority of the comments (approximately 78.5%) opposed the proposal in whole or in part. Approximately 14% of the comments supported the proposal. A few comments offered drafting suggestions but did not take a position.

Members of the Task Force received 1) a complete set of the public comments; 2) an outline containing the gist of the public comments, as combined; and 3) a chart showing all the public comments in chronological order, which contained the date of each comment, the name and identity of the individual or group commenting, the position, and a summary of the comment.³

² Almost all of those comments were sent to the State Bar in direct response to the public posting of the June 2006 proposed insurance disclosure rules. Given earlier notice about the proposal in general, some comments were received before the actual proposal was released, and those comments were included in the review. Comments were also gathered from other public sources, such as letters to the editor and articles in the legal press. Some individuals commented more than once, in various forms, and multiple comments from individuals were included for the sake of completeness.

³ The public comment outline and public comment chart are included as Attachments 2 and 3 to this Agenda Item. A complete set of the public comments is also being provided to the members of RAD in

D. Revised Task Force recommendations following consideration of public comments

On February 16, 2007, the Task Force met to consider the public comments and the formulation of further recommendations in response to those comments. Given the nature and scope of the public comments, the Task Force did not take anything in the June 2006 proposal as a given. The Task Force began its discussions with the initial question of whether California should adopt any insurance disclosure requirement. The Task Force fully considered the public comments but nonetheless concluded, as it had before, that the important goal of client protection would be advanced by an insurance disclosure requirement, and that this goal outweighed the concerns expressed about imposing any such requirement.

The Task Force then proceeded to address the remaining key questions, in light of the public comments: 1) whether the required disclosure should be made directly to the client, to the State Bar or to both; 2) whether attorneys should be required to disclose to clients a) the presence or absence of insurance coverage, or b) only the absence of insurance coverage; 3) what the best method of enforcement for an insurance disclosure requirement should be, and what the sanctions should be for noncompliance; and 4) what categories of attorneys should be exempt from an insurance disclosure requirement. Ultimately, the Task Force decided to recommend keeping the basic structure of its June 2006 proposal, for the same fundamental reasons set forth in its June 2006 Report and Recommendations. As discussed below, however, the Task Force recommends modifications to some particular aspects of the initial proposal, in response to concerns raised in the public comments.

1. The proposed rules should be revised to change “covered by” professional liability insurance to “have” or “has” professional liability insurance.

As proposed in June 2006, the Rule of Professional Conduct would have required attorneys who are not “covered by” professional liability insurance to disclose that fact directly to clients. Likewise, under the proposed Rule of Court, the State Bar would have publicly identified attorneys who certified that they are not “covered by” professional liability insurance.

Several public comments expressed concerns with use of the term “covered by.” The term is in essence a legal conclusion, and a determination of whether a particular claim against an attorney is ultimately “covered by” insurance is based upon a multitude of facts and circumstances, including the nature of the claim, the timing of the claim, and the terms and conditions of the particular insurance policy at issue. A representation based on whether an attorney is “covered by” professional liability insurance was seen by many as uncertain at best.

connection with its consideration of this Agenda Item, and those comments are available to others upon request.

In its public comment, the State Bar's Committee on Professional Liability Insurance recommended that alternative language be utilized, such as: "A member who does not have professional liability insurance" This language would address the situation where an attorney believes that he or she "has" professional liability insurance, but a claim is made that is ultimately determined not to be "covered by" the particular professional liability insurance policy. The Task Force agrees with the proposed change and, in response to concerns that were expressed, recommends that the proposed rules be revised to change "covered by" professional liability insurance to "have" or "has" professional liability insurance.

2. The proposed rules should be revised so that disclosure is required if an attorney "knows or should know" that he or she does not have professional liability insurance.

As proposed in June 2006, the insurance disclosure rules did not contain any scienter requirement. Several comments expressed opposition on the grounds that the proposed rules could penalize otherwise innocent attorneys who believe in good faith that they are in full compliance with the rules.

Among other things, the comments noted that many attorneys rely upon insurance policies obtained by others, such as their law firms. Attorneys who do not place insurance coverage for a firm (or for themselves) may not know that the coverage has lapsed, or may be told that they have coverage when they do not. Several comments expressed concerns about the possibility of a gap in coverage, when switching carriers or when obtaining coverage and failing to obtain coverage for errors and omissions occurring before the effective date of the new policy, and noted that a gap may not be clear at the time it occurs.

To address these concerns, the Task Force recommends that 1) the proposed Rule of Professional Conduct be revised to impose a disclosure obligation on an attorney who "knows or should know" that he or she does not have professional liability insurance; and 2) the proposed Rule of Court be revised so that a member will be subject to discipline if the member "knows or should know" that the information provided to the State Bar is false.

3. The proposed Rule of Professional Conduct should be revised so it applies prospectively only, to new clients and new engagements with returning clients.

As proposed in June 2006, the Rule of Professional Conduct would have required attorneys, within thirty days of the effective date of the new rule, "to inform in writing all existing clients for whom the member is currently rendering continuing legal services if the member is not covered by professional liability insurance." Several public comments expressed the view that the rules should apply prospectively only, and made three main points.

First, many commented that requiring notice to existing clients would negatively intrude into an already existing relationship between the attorney and client. Clients may become angry or suspicious because the attorney did not reveal the insurance information sooner – and only revealed the information when required to do so by the State Bar – and that could set the attorney up for other potential problems. Others stated that the notice requirement could create confusion if, for example, a client received notice of the absence of insurance in the middle of litigation.

Second, some comments stated that notifying existing clients could involve a significant amount of time, and that the cost of notifying existing clients could be prohibitive.

Third, requiring that notice be given to “existing clients” raised a definitional issue. Although the proposed Rule of Professional Conduct provided some clarification, by noting that the requirement would apply only to those existing clients for whom an attorney is “currently rendering legal services” there still appeared to be some confusion concerning the scope of this requirement.

On a separate but related issue, the public comments also expressed a lack of clarity concerning language in the Discussion of the proposed Rule of Professional Conduct, which stated that the disclosure requirement applies with respect to “returning clients” who engage an attorney to “provide additional legal services.” Questions were raised, for example, about whether the requirement would apply if a client contacted an attorney for further assistance of a type that was previously provided.

In response to these comments, the Task Force recommends that the Rule of Professional Conduct be revised to delete Paragraph (C) in the June 2006 proposal, which would have required notice to be given to existing clients within 30 days of the effective date of the new rule. With this deletion, the disclosure obligation would apply prospectively only. The Task Force also recommends that the Discussion in the Rule of Professional Conduct clarify that the obligation applies with respect to “new clients and new engagements with existing clients.” Finally, the Task Force recommends that there be some period of delayed implementation after the effective date of any new Rule of Professional Conduct (perhaps 90 days), so the new rule can be publicized, and attorneys are not caught off-guard.

4. The requirement for a signed acknowledgment from the client should be deleted from the proposed Rule of Professional Conduct.

As proposed in June 2006, the Rule of Professional Conduct would have required attorneys without professional liability insurance to 1) provided notice to the client in writing; *and* 2) obtain the client’s signed and dated acknowledgment of receipt of notice of non-coverage. Some of the public comments objected to this second requirement. The comments noted that it may be difficult to get a client to sign and return a document. Until the lawyer received the signed acknowledgement back from

the client, he or she could not perform legal services without violating the rule. The requirement of the written acknowledgement was viewed as a recipe for potential mischief.

In response to these concerns, the Task Force recommends deleting the requirement for a signed acknowledgment from the client. The Task Force believes that requiring written notice to the client provides adequate client protection, and will be a sufficient means of minimizing evidentiary issues in the event a dispute arises about the fact of the disclosure.

5. The rule requiring disclosure to the State Bar should be revised so it requires attorneys to disclose to the State Bar whether they have insurance only when they “represent or provide legal advice to clients,” and related amendments should be made throughout the rules.

As proposed in June 2006, the Rule of Court would have required each active member who is not exempt under the rule to certify 1) whether the member is currently covered by professional liability insurance; and 2) whether the member represents clients. The proposed Rule of Professional Conduct also used the term “represent clients.” The public comments raised two drafting issues relating to the proposed language.

First, the proposed rules did not define “represent clients” and some understood it to mean represent clients in litigation or administrative proceedings only. That construction is too narrow, and inconsistent with the intent of the proposed rules. Consistent with the intent of the initial proposal, the Task Force therefore recommends that “represent clients” be changed throughout the proposed rules to “represent or provide legal advice to clients.”

Second, the proposed Rule of Court would have required each active member who is not exempt under the rule to certify “whether the member represents clients.” The significance of providing that information – by itself – was not explained, and the proposed rule would have required all non-exempt active members to provide the insurance certification, whether or not they “represent clients.” To address this drafting issue, the Task Force recommends amending the Rule of Court so it requires an attorney to certify whether he or she has professional liability insurance only if the attorney represents or provides legal advice to clients.⁴

⁴ This is similar to the structure of *ABA Model Court Rule on Insurance Disclosure* and the rule in several states. See, e.g., Idaho, Kansas, Minnesota, Nevada, and North Carolina.

6. The title of both rules should be changed to “Disclosure of Professional Liability Insurance.”

As proposed in June 2006, both rules were entitled “Insurance Disclosure.” One comment recommended “Disclosure of Professional Liability Insurance” as a more complete description of the subject matter. The Task Force agrees with this recommendation.

7. The adoption of an insurance disclosure requirement should be part of an expanded insurance-related package.

In its June 2006 recommendation, the Task Force recommended that, in addition to the proposed insurance disclosure rules, general educational information about professional liability insurance be developed and made publicly available. The Task Force continues to recommend that State Bar staff develop public educational information in consultation with the Task Force members.⁵ During its February 2007 meeting, the Task Force discussed a potential expansion of the educational material to address a variety of issues raised by the public comments such as, for example, reasons why an attorney may choose not to purchase professional liability insurance.

Finally, many comments expressed the view that an insurance disclosure requirement is unfair, *unless* affordable insurance is made available to all attorneys. Others opposed an insurance disclosure requirement, but contended that, as an *alternative*, the State Bar should explore methods of making professional liability insurance more affordable and available to all attorneys. As discussed above, the Task Force continues to recommend in favor of the adoption of insurance disclosure rules. At the same time, the Task Force believes the Board of Governors should address related issues that have been raised in the public comments. The Task Force therefore recommends that the Board of Governors, as part of an expanded insurance-related package, study 1) methods of making professional liability insurance more affordable and widely available to attorneys; and 2) additional means of compensating clients who are harmed by uninsured attorneys.⁶

⁵ In its June 2006 Report and Recommendations, the Task Force noted that examples of issues that could be addressed in the educational material include 1) the potential significance of policy limits; 2) typical coverage limitations; 3) typical coverage exclusions; 4) deductibles; 5) “wasting limits”; and 6) the claims-made nature of most professional liability insurance policies. The Task Force further noted that the information may also state that California attorneys are not required to maintain professional liability insurance, and encourage prospective clients to discuss certain insurance-related issues with an attorney before an engagement.

⁶ The current Task Force proposal differs from the June 2006 proposal in other minor ways that are not discussed above. The proposed Rule of Court has been updated to be consistent with non-substantive amendments made to the California Rules of Court, as part of a comprehensive revision, effective January 1, 2007. The Task Force also recommends some additional, non-substantive revisions to the proposed rules, which are shown in the revised proposal.

E. Proposal

Under the State Bar's Rules for Public Comment, the Board of Governors or a Board Committee may shorten the 90-day public comment period if, in its discretion, it determines that a shortened public comment period is necessary.⁷ The Task Force recommends that a 30-day public comment period be authorized in this case. This will be the second time that the proposed insurance disclosure rules are circulated for public comment. During the first public comment period, the State Bar received extensive comments on the June 2006 proposal. Those comments addressed a wide variety of issues, ranging from the basic concept of the proposal to suggestions for technical amendments. The Task Force fully considered the public comments received in response to the June 2006 proposal. The focus of the second public comment period will be the proposed amendments to that proposal, which will involve a much narrower and more targeted inquiry.

The Task Force proposes that the RAD 1) approve the request to release the revised, proposed new insurance disclosure rules for a public comment period of 30 days; and 2) approve the accompanying recommendation to maintain the Insurance Disclosure Task Force as a resource to assist with developing public educational material concerning professional liability insurance, to complement any insurance disclosure requirement. The Task Force also recommends that the Board of Governors study 1) methods of making professional liability insurance more affordable and widely available to attorneys; and 2) additional means of compensating clients who are harmed by uninsured attorneys.

II. FISCAL/PERSONNEL IMPACT

The fiscal and personnel impact are unknown at this time. The mere adoption of the proposed Rule of Professional Conduct does not involve an unbudgeted fiscal or personnel impact. The cost associated with the new Rule of Court is largely dependent on the mechanism by which the required attorney reporting is accomplished. If the State Bar is required to mail a form to each active member – likely to be separate and apart from the annual fee statement – and each active member is then required to fill out the form and mail it back to the State Bar, there would be additional postage costs and increased staff costs associated with receipt of the information and data entry. If, on the other hand, attorneys are able to enter the information online through the State Bar's member profile, there would be some programming costs, but they would be relatively minor compared to the costs of manual processing. In either event, there will also be unknown staff costs that are required in order to perform routine compliance, monitoring, and auditing functions.

⁷ The rules provide that in exercising its discretion, the Board or Board Committee "shall consider the following factors: the complexity of the proposed change; the number of individuals or organizations likely to be affected by the proposed change; the reasons why urgency is required; and any other facts or circumstances which the Board or Board Committee deems relevant to its determination."

III. IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

Operational issues relating to the new rules, if adopted, will need to be incorporated into the Board Book and Administrative Manual.

IV. PROPOSED RESOLUTION

Should the Regulation, Admissions and Discipline Oversight Committee approve the request to release the revised, proposed new insurance disclosure rules for public comment, and approve the accompanying recommendations of the Insurance Disclosure Task Force, the following resolutions would be appropriate:

RESOLVED that the Regulation, Admissions and Discipline Oversight Committee hereby finds good cause to shorten to a period of 30 days the public comment period on the proposed amendment to Rule 9.6 of the California Rules of Court, proposed new Rule 9.7 of the California Rules of Court, and proposed new Rule 3-410 of the California Rules of Professional Conduct; and it is

FURTHER RESOLVED that the Regulation, Admissions and Discipline Oversight Committee hereby authorizes staff to make available for public comment for a period of 30 days the proposed amendment to Rule 9.6 of the California Rules of Court, and proposed new Rule 9.7 of the California Rules of Court, in the form attached hereto as Attachment A; and it is

FURTHER RESOLVED that the Regulation, Admissions and Discipline Oversight Committee hereby authorizes staff to make available for public comment for a period of 30 days proposed new Rule 3-410 of the California Rules of Professional Conduct, in the form attached hereto as Attachment B; and it is

FURTHER RESOLVED that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed items; and it is

FURTHER RESOLVED that the Regulation, Admissions and Discipline Oversight Committee recommends that the Insurance Disclosure Task Force be maintained as a resource to assist with developing public educational material concerning professional liability insurance, to complement any insurance disclosure requirement; and it is

FURTHER RESOLVED that the Regulation, Admissions and Discipline Oversight Committee accepts the Insurance Disclosure Task Force recommendation that the Board of Governors, as part of an expanded insurance-related package, study 1) methods of making professional liability insurance more affordable and widely available to attorneys; and 2) additional means of compensating clients who are harmed by uninsured attorneys.

Proposed New Insurance Disclosure Rules

Proposed Amendment to Rule 9.6 of the California Rules of Court and Proposed New Rule 9.7 of the California Rules of Court

**(As amended following February 16, 2007 Task Force meeting)
and
(Updated to be consistent with amendments to the
California Rules of Court, effective January 1, 2007)**

California Rules of Court

Rule 9.6. Roll of attorneys admitted to practice

The State Bar must maintain, as part of the official membership records of the State Bar, the Roll of Attorneys of all persons admitted to practice in this state. Such records must include the information specified in Business and Professions Code sections 6002.1 and 6064, rule 9.7 of these rules, and other information as directed by the Supreme Court.

Rule 9.7. ~~Insurance disclosure~~ Disclosure of Professional Liability Insurance

- (a) Each active member who is not exempt under subdivision (b) must certify to the State Bar in the manner that the State Bar prescribes:
 - (1) Whether the member ~~is currently covered by professional liability insurance~~ represents or provides legal advice to clients; and
 - (2) ~~Whether the member represents clients. If the member represents or provides legal advice to clients, whether the member currently has professional liability insurance.~~
- (b) Each active member who is employed as a government lawyer or in-house counsel and does not represent or provide legal advice to clients outside that capacity must certify those facts to the State Bar in the manner that the State Bar prescribes. Members who provide this certification are exempt from providing information under subdivision (a).
- (c) Each member who transfers from inactive status to active status must provide the State Bar with the certification required under subdivision (a) or (b), as applicable, within thirty days of the effective date of the member's transfer to active status.

- (d) A member must notify the State Bar in writing of any change in the information provided under subdivision (a) or (b) within thirty days of that change.
- (e) The State Bar will identify each individual member who certifies under subdivision (a) that he or she ~~is not covered by~~ does not have professional liability insurance by making that information publicly available upon inquiry and on the State Bar's website or by a similar method.
- (f) A member who fails to comply with this rule in a timely fashion may be suspended from the practice of law until the member complies. If a member ~~supplies false information~~ knows or should know that the information supplied in response to this rule is false, the member will be subject to appropriate disciplinary action.

Comment

Rule 9.7(b) provides an exemption for a "government lawyer" or "in-house counsel" provided the member does not "represent or provide legal advice to clients outside that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to make information available to a client or potential client, through the State Bar, if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.

Proposed New Rule 3-410 of the California Rules of Professional Conduct

(As amended following February 16, 2007 Task Force meeting)

California Rules of Professional Conduct

Rule 3-410. ~~Insurance disclosure~~ Disclosure of Professional Liability Insurance

- (A) A member who knows or should know that he or she is not covered by ~~does not have~~ professional liability insurance shall inform a client at the time of the client's engagement of the member that the member ~~is not covered by~~ does not have professional liability insurance. The notice required by this paragraph shall be provided to the client in writing, ~~and the member shall obtain from the client a signed and dated acknowledgment of receipt of that notice.~~
- (B) If a member ~~is covered by professional liability insurance~~ does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently ~~ceases to be covered by~~ knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member ~~ceases to be covered by~~ knows or should know that he or she no longer has professional liability insurance.
- ~~(C) Within thirty days of [insert effective date of this rule], a member shall inform in writing all existing clients for whom the member is currently rendering continuing legal services if the member is not covered by professional liability insurance.~~
- ~~(D)~~ (C) Paragraphs (A), (B) and (C) ~~do~~ This rule does not apply to a member who is employed as a government lawyer or in-house counsel and does not represent or provide legal advice to clients outside that capacity.

Discussion

[1] ~~The disclosure obligation imposed Under by Paragraph (A) of this rule, a member who is not covered by professional liability insurance is required to disclose that fact directly to a client at the time of the engagement. This requirement applies with respect to new clients and new engagements with returning clients who engage a member to provide additional legal services. Paragraph (C) of this rule is transitional, and requires notice to existing clients for whom a member is currently rendering continuing legal services on the effective date of this rule. Notice is not required pursuant to Paragraph (C) if, for example, before the effective date of this rule, a member has completed the preparation of a will for a client or completed legal services relating to the incorporation of a client's business, if no continuing legal services are being provided for the client on the effective date of this rule. If, however, the same client returns for additional legal~~

~~services after the effective date of this rule, notice would be required pursuant to Paragraph (A).~~

[2] A member may use the following language in making the disclosure required by Rule 3-410(A) ~~or Rule 3-410(C)~~, and may include that language in a written fee agreement with the client or in a separate writing:

“Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I ~~am not covered by~~ do not have professional liability insurance.”

[3] A member may use the following language in making the disclosure required by Rule 3-410(B):

“Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I ~~am no longer covered by~~ have professional liability insurance.”

[4] Rule 3-410(D) provides an exemption for a “government lawyer” or “in-house counsel” provided the member does not “represent or provide legal advice to clients outside that capacity.” The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.